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NO. _____

IN THE

Supreme Court of the United States

October Term, 1981

BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC.; GEORGIA WASTE SYSTEMS, INC.; SCA SERVICES OF GEORGIA, INC.; COMPLETE REFUSE REMOVAL, INC.; JAMES L. BAKER; RAYMOND E. DINKLE; CHARLES W. LANGELLO; ROY P. FOWLER, JR.; RICHARD BEARDEN and FARRELL E. NIXDORF,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENTS OF THE DISTRICT COURT GRANTING WHAT THE DISTRICT COURT HELD TO BE TIMELY MOTIONS TO DISMISS INDICTMENTS BECAUSE OF ACKNOWLEDGED FAILURES TO COMPLY WITH THE PROVISIONS OF THE JURY SELECTION AND SERVICE ACT OF 1968 (TITLE 28 U.S.C. §1861, ET SEQ.), DESPITE THE DISTRICT COURT'S UNCONTESTED FINDINGS OF (1) A HISTORY OF SUBSTANTIAL FAILURES TO COMPLY WITH THE ACT AND THE LOCAL JURY PLAN; (2) A FAILURE TO USE REQUIRED RANDOM SELECTION PROCEDURES; (3) A FAILURE TO GIVE REQUIRED PUBLIC NOTICES; AND (4) NUMEROUS PURPOSEFUL, NONOBJECTIVE DISQUALIFICATIONS, EXEMPTIONS AND EXCUSALS OF QUALIFIED JURORS FROM JURY SERVICE.

II. WHETHER THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE JURY SELECTION AND SERVICE ACT OF 1968 (TITLE 28 U.S.C. §1861, ET SEQ.) AS REQUIRING PROOF OF A DISCRIMINATORY INTENT OR IMPACT, OR A POTENTIAL FOR SUCH, BEFORE ACKNOWLEDGED VIOLATIONS OF THE ACT ARE DEEMED SUBSTANTIAL ENOUGH TO REQUIRE RELIEF, IN LIGHT OF THE CONGRESSIONAL HISTORY INDICATING THAT COMPLIANCE WITH THE ACT SHOULD BE JUDGED BY PROCEDURAL REGULARITY ALONE.

PARTIES TO PROCEEDINGS BELOW

In addition to the parties whose names appear in the caption of this Petition [1] the following were parties to the proceeding in the court whose judgment is sought to be reviewed: Northside Realty Associates, Inc.; Barton & Ludwig, Inc.; Harry Norman & Associates, Inc.; Clover Realty Co.; Edwin A. Isakson; Chandler B. Barton; Harry Norman, Jr.; and Clarence Stowers, Jr.

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[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following are parents, wholly owned subsidiaries or affiliates of the named corporate petitioners herein: Waste Management, Inc. (parent of Georgia Waste Systems, Inc.); Communication Equipment Sales and Service, Inc., Complete Garbage Service, Inc., Atlanta Garbage Service, Inc. and Georgia Roller Skating Rinks, Inc. (wholly owned subsidiaries of Complete Refuse Removal, Inc.), SCA Services, Inc. (parent of SCA Services of Georgia, Inc.); Browning-Ferris Industries, Inc. (parent of Browning-Ferris Industries of Georgia, Inc.).

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Petitioners,

VS.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Browning-Ferris of Georgia, Inc.; Georgia Waste Systems, Inc.; SCA Services of Georgia, Inc.; Complete Refuse Removal, Inc.; James L. Baker; Raymond E. Dinkle; Charles W. Langello; Roy P. Fowler, Jr.; Richard Bearden and Farrell E. Nixdorf (hereinafter referred to as "Petitioners" or "Defendants") respectfully ask that a Writ of Certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fifth Circuit, Unit B (now the Eleventh Circuit).

OPINIONS BELOW

This case grows out of grand and petit jury challenges, under Title 28 U.S.C. §1867(d), alleging that the grand juries which returned the indictments against the Defendants were chosen by a juror selection system which was not substantially in compliance with the Jury Selection and Service Act of 1968. (Title 28 U.S.C. §1861, et seq.) The Honorable William C. Keady, Chief Judge of the United States District Court for the Northern District of Mississippi, sitting by designation of the Fifth Circuit Court of Appeals, granted the Defendants' jury challenge motions in an opinion which is reported as *United States v. Northside Realty Associates, Inc., et al.*, 510 F.Supp. 668 (N.D.Ga. 1981). (See Appendix, p. 1a). The decision of Judge Keady was reversed by the Fifth Circuit, Unit B, in an opinion which is reported as *United States v. Bearden, et al.*, 659 F.2d 590 (5th Cir. 1981). (See Appendix, p. 86a).[2]

JURISDICTION

Jurisdiction for this appeal lies under Title 28 U.S.C. §1254(1) in that the petition seeks review of a case in the Court of Appeals. The decision appealed from was entered on October 19, 1981. A timely motion for rehearing and rehearing en banc was denied on December 2, 1981. (See Appendix, p. 142a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case concerns the following relevant sections of the Jury Selection and Service Act of 1968, Title 28 U.S.C. §1861 et seq., and the Amended Plan of the United States

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[2] This case was consolidated with other cases at both the district court and appellate court levels.

District Court for the Northern District of Georgia, All Divisions, For the Random Selection of Grand and Petit Jurors, which because of their length are set out verbatim in the Appendix, pp. 144a-150a:

The Jury Selection and Service Act of 1968, 28 U.S.C. §1861 et seq. –

§§1861, 1863, 1866 and 1867

The Amended Plan of the United States District Court for the Northern District of Georgia, All Divisions, For the Random Selection of Grand and Petit Jurors –

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STATEMENT OF THE CASE

(i) Proceedings Below.

This case concerns "grand jury challenges" brought by Petitioners in the United States District Court for the Northern District of Georgia. Those challenges, which were joined in by numerous other defendants who had cases pending in the same court, raised both constitutional and statutory challenges to the procedures in the Northern District of Georgia for the selecting and summoning of grand and petit jurors.

The Honorable William C. Keady, Chief Judge of the Northern District of Mississippi, was designated by the Fifth Circuit to hear the challenges. On March 17, 1981, Judge Keady granted the defendants' motions, finding

numerous substantial violations of the Jury Selection and Service Act of 1968, Title 28 U.S.C. §1861 et seq. (the "Act") and the Amended Plan of the United States District Court for the Northern District of Georgia, All Divisions, For the Random Selection of Grand and Petit Juries (the "Plan"), dismissing the indictments against the Petitioners, without prejudice to reindictment upon correction of the statutory deficiencies. *United States v. Northside Realty Associates, Inc., et al.*, 510 F.Supp. 668 (N.D.Ga. 1981).

The prosecution sought an interlocutory appeal of Judge Keady's decision under Title 18 U.S.C. §3731. On October 19, 1981, a panel of the Fifth Circuit, Unit B, reversed the District Court. Though the Court of Appeals left undisturbed the District Court's findings of violations of the Act and the Plan, it concluded that the violations were not sufficiently substantial to warrant relief. *United States v. Bearden, et al.*, 659 F.2d 590 (5th Cir. 1981). A timely motion for rehearing and rehearing en banc was denied on December 2, 1981.

(ii) **Statement of the Facts.**

There are *no factual disputes* presented in this petition. The fact findings of the District Court of failures to comply with the Act and the Plan were not disturbed by the Court of Appeals. Indeed, most of these violations were acknowledged by the prosecution. The only issue is whether, *as a matter of law*, these acknowledged violations were sufficient to support the District Court's conclusion that they amounted to a "substantial failure to comply" with the provisions of the Act. Title 28 U.S.C. §1867(d).

After a ten-day hearing, which was the culmination of what the District Court described as "perhaps the most intensive and far-reaching challenge of the administra-

tion of a federal judicial district jury plan since the adoption of the Jury Selection and Service Act 13 years ago," 510 F.Supp. at 705, the trial court found numerous failures by the jury clerks in the Northern District of Georgia to comply with the provisions of the Act and the Plan. Most of these violations were acknowledged by the government. More significant to the issue here, the District Court further found that these violations were so "widespread", "persistent" and "serious" that they amounted to a "substantial failure to comply" with the provisions of the Act and that dismissal of the indictments was required under Title 28 U.S.C. §1867(d). 510 F.Supp. at 705-706.

Among the numerous violations of the Act and the Plan found by the District Court was the failure of the jury clerk to select grand and petit jurors *randomly*, as required by Title 28 U.S.C. §1861 and §1866 and pages 89-90b of the Plan. Jurors were not being randomly drawn because the jury clerk refused to follow the requirements of the Plan for selecting a "starting number" by lot, instead picking the "starting number" by opening a book or more usually "thinking one up", methods that the prosecution's own expert admitted were nonrandom.[3] More-

[3] The Act and Plan provide for the creation of a "master wheel" by randomly selecting names from the general community (typically from the voter registration list). The individuals on the master wheel are then sent questionnaires to determine whether or not they should be excluded, excused, exempted or disqualified from jury service. After appropriate exclusions, exemptions, excusals and disqualifications have been granted, the remaining names constitute the qualified wheel. The Act and the Plan provide that actual jury panels are to be composed by *randomly* selecting names from this qualified wheel. Title 28 U.S.C. 1866(a).

The Plan provides that the process for selecting names from the qualified wheel is to begin with the *random* drawing by lot from a drum or box of a "starting number" which would then be used by a computer to select from the list of qualified jurors the particular jurors to be summoned (Plan, p. 90a). However, the jury clerk admitted, and the District Court so found, that she rarely used this prescribed

over, the nonrandom methods used by the jury clerk excluded more than half of the eligible jurors on each grand jury selection, because the starting number "thought up" was virtually always in the lower half of the range of the usual 557 possible "starting numbers". 510 F.Supp. at 689-690.

The District Court further found that these improprieties of the jury clerk in picking a starting number were masked because of the failure of the jury clerk to post public notices of the "starting number drawings", which were in fact not occurring, as required by the Act, 28 U.S.C. §1866(a), and the Plan, p. 90b. 510 F.Supp. at 693-695. The District Court found that the jury clerk intentionally persisted in this violation. Litigants had complained of the failure to post proper public notices before and the clerk's office had represented to the court that it would comply in the future. *U.S. v. Davis*, 546 F.2d 583, 588 fn.17 (5th Cir. 1977). In fact, it continued to refuse to post proper notices.[4]

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method because it was bothersome, instead picking the starting number by opening a book or more usually "thinking one up". 510 F. Supp. at 689-690.

[4] The District Court found:

"Before choosing the starting number, the clerk's office is required to post public notice of the event. Afterwards, notice of the starting number selected is to be posted. Since 1971, Angela Turner, the jury clerk who continues to serve under Ben H. Carter, the current clerk of court, has been in charge of this procedure as well as the qualification process. Turner rarely complied with the first notice requirement. In fact, for almost every drawing at issue, both notices were posted simultaneously, *after* the starting number had been drawn. On one or two occasions, when pressed for time, the clerk's office posted no notice at all. On the infrequent occasions when notices were posted before drawing the starting number, the number was selected no more than a few hours later. Sometimes selection of the starting number took place right away—as soon as the jury clerk could return to the clerk's office to perform the drawing. A few times Turner posted notices in her office behind her desk. She continued these practices despite contrary instructions by Carter, after previous challenges to the district's jury selection procedures. 510 F.Supp. at 688 (emphasis original).

The Petitioners' motions also complained of numerous violations by the clerk's office in excluding, disqualifying, exempting or permanently excusing jurors. The District Court agreed that 495 potential jurors were improperly disqualified, exempted or excused. This finding was not disturbed by the Court of Appeals, 659 F.2d at 604-609.

For example, 178 qualified jurors were excluded from jury service merely because they were over 70, even though they had not requested an elective exemption. (Plan, pp. 87-88). The District Court found that these disqualifications were not inadvertent. 510 F.Supp. at 697. Indeed, the head jury clerk deliberately disqualified people over 70. She testified that she believed that jury service by the elderly "clogs up the works" and "inhibits justice". (Record Vol. 15, pp. 829-830). Moreover, some qualified jurors over 70 were disqualified even though they had not requested excusal, "if their handwriting was 'shaky' or if they resided in a nursing or retirement home", because these characteristics supposedly indicated to jury clerks a "mental infirmity".[5] 510 F.Supp. at 701, fn. 49.

The District Court concluded that the above violations were not isolated administrative errors, but were so "widespread", "persistent" and "serious" that they could not be overlooked as insubstantial, and dismissal of the indictments was required as the appropriate remedy

[5] Similarly, 72 qualified jurors were excluded because of their occupation though no exemption was requested, 184 qualified jurors were removed simply because they had moved from one division to another within the district and 61 qualified jurors were improperly barred from jury service because they had served on a jury within 2 years of completing the juror questionnaire. The District Court also found that 138 jurors were improperly permanently excused from jury service when they should have been excused only temporarily because of hardship circumstances. Title 28 U.S.C. §1866(c).

specifically required by the Act, 28 U.S.C. §1867(d). 510 F.Supp. at 705-706.

The Court of Appeals did not disturb any of the findings by the District Court of violations of the Act. Instead, it noted that it did not "condone" the violations and "assumed the practices have been or will be corrected". Nevertheless, applying a "potential for discrimination" standard for substantiality, the Court of Appeals concluded that because no discriminatory impact or intent had been proven, nor a discriminatory "potential" shown, the acknowledged numerous violations did not result in a "substantial failure to comply" with the Act or the Plan requiring dismissal under Title 28 U.S.C. §1867(d).[6] 659 F.2d at 602, 607, 609-610.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF REASONS

The Jury Selection and Service Act of 1968, Title 28 U.S.C. §1861, et seq. (the "Act") was one of the most important Congressional reforms of the federal judicial system in this century. It fundamentally changed the way federal jurors are selected and summoned. Moreover, it provided for enforcement of these reforms through "chal-

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[6] The Court of Appeals also reversed the judgments of the District Court as to some, *but not all*, of the defendants, on the grounds that they had failed to raise timely their claims under the Act, as required by 28 U.S.C. §1867(a). Though the petitioners believe that the Court of Appeals erred in rejecting the "reasonableness" standard enunciated by the District Court, 510 F.Supp. at 676, they do not contend that this issue *alone* is certifiable. It is a "subsidiary question fairly included" in the questions presented for review and should be addressed by the Court with regard to those individual petitioners should a Writ of Certiorari be granted, but will not be further addressed herein. Rule 21.1(a) of the Rules of the Supreme Court of the United States.

lenges" by litigants when court officials substantially fail to implement the strict requirements of the Act. Title 28 U.S.C. §1867(a) and (d). Yet this Court has never heard a case interpreting the Act.

Specifically, this Court has never defined the standard for determining when violations of the Act are sufficiently "substantial" to require relief. The result has been confusion and conflict among the lower courts, as occurred here when the District Court and the Court of Appeals reached opposite conclusions from the same facts. This confusion and conflict can be resolved by clarification by this Court of what the standard should be.

Moreover, this confusion and conflict results from the lack of guidance from this Court in deciphering Congressional intent in passing the Act. Did Congress intend to require a litigant to prove that acknowledged violations of the Act must have a "potential for discrimination" before relief is required, as the Court of Appeals held? Or did Congress intend for "procedural regularity" *alone* to be the test for compliance, as the District Court held?

There are significant questions of federal law, intimately affecting the administration of the federal courts, which have not been previously addressed by the Court, *but should be*. Rule 17 of the Rules of the Supreme Court. Accordingly, a Writ of Certiorari should be granted.

II. THE STANDARD FOR ENFORCEMENT OF THE REFORMS IN THE JURY SELECTION AND SERVICE ACT OF 1968 IS AN IMPORTANT ISSUE OF FEDERAL LAW, INTIMATELY AFFECTING THE ADMINISTRATION OF THE FEDERAL COURTS, WHICH HAS NOT BEEN BUT SHOULD BE ADDRESSED BY THIS COURT. MOREOVER, THE SILENCE OF THIS COURT HAS RESULTED IN CONFUSION AND CONFLICT AMONG THE LOWER COURTS.

Since the enactment of the Jury Selection and Service Act of 1968, 28 U.S.C. §1861 *et seq.* (the "Act"), this Court has never heard a case interpreting the requirements of the Act. The silence of this Court has resulted in confusion in the lower courts concerning the interpretation of the important provisions of the Act. The most important of these unresolved questions is the standard for determining when a violation of the Act is sufficiently substantial to require dismissal of an indictment under Title 28 U.S.C. §1867(d).

This case is a classic example of that confusion. In a detailed and thoughtful decision, the District Court concluded from the specific statutory language of the Act, as well as from its legislative history, that a substantial violation of the Act occurs when a failure to comply with the requirements of the Act defeats one or both of the "two important general principles" embodied therein, namely (1) the random selection of jurors, and (2) the determination of juror disqualifications, excuses, exemptions and exclusions on the basis of objective criteria alone. The District Court concluded that though *de minimis* violations should be found to be "harmless", failures to comply with the Act which materially defeat

these two important general principles require relief. 510 F.Supp. at 685-687.

Applying these general principles obtained from the legislative history and previous lower court rulings, the District Court concluded that the starting number, public notice, and disqualification, exclusion, exemption and excusal violations found here were not isolated and harmless administrative errors of "*de minimis* effect", but were instead "serious, persistent deviations" which "have been carried out by the clerk's office contrary to the mandate of the Act and Plan, and are violations of such substance and magnitude as to require our disapproval".[7] 510 F.Supp. at 705.

The Court of Appeals disagreed. While admitting that the Act and the legislative history make clear that the two important general principles embodied in the Act are randomness and objectivity, the Court of Appeals held that in interpreting these principles the courts should never "lose sight of the fundamental purpose of the law", being the prevention of discrimination. The court therefore concluded, "Where the procedural errors made by

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[7] The District Court concluded:

"It is beyond cavil, however, that Congress and the district court in devising its Local Plan emphatically and specifically address as matters of prime concern the need for obtaining a fair cross-section of the community to serve as grand and petit jurors in the federal district courts, *selected objectively through a random process.* The painstaking and detailed care of Congress and the district court to devise specific methods to accomplish these goals would be whittled away if courts fail to require their observance by judicial officers as well as court personnel who are charged with the responsibility for administering the jury selection process. The rule of reason, which regards inadvertent, imperfect efforts as insubstantial, must require that the jury selection process not become *infected with subjective extra-statutory standards, nor can the rule of reason allow authorized methods of randomness to be displaced by private whim.*" 510 F.Supp. at 705. (Emphasis added).

those in charge of selecting jurors do not raise the possibility of frustrating this goal (non-discrimination), a court should be hesitant to order the drastic remedy of the dismissal of indictments." 659 F.2d at 609. Thus, the Court of Appeals adopted a standard of substantiality under which violations of the Act and Plan which in fact defeat the "general principles" of randomness and objectivity are, nevertheless, not sufficiently substantial to require relief unless there is *also* shown either a discriminatory intent or impact, or the potential for such a discriminatory impact.

Petitioners believe that the District Court was right and the Court of Appeals was wrong. As will be discussed in more detail in Section III below, the specific language of the Act, Title 28 U.S.C. §1861, as well as the legislative history, indicate that a defendant is not required to prove a discriminatory intent or impact, or the potential for such, before violations of the Act affecting randomness and objectivity become sufficiently substantial to require relief. Congress specifically rejected such a prejudice standard. Indeed, one of the primary concerns which led to the reforms included in the Act was the difficulty in proving discrimination. Instead, Congress established a "largely mechanical" jury selection process in which "procedural regularity" is the test of legitimacy. However, instead of judging the substantiality of the violations by reference to the degree to which "procedural regularity", "randomness" and "objectivity" were abrogated, the Court of Appeals focused on whether or not the defendants had been prejudiced because of a potential for discrimination, thus adopting a standard which had been rejected by Congress. (See Section III *infra*.)

However, whether the District Court or the Court of Appeals was right, is not the crucial issue in determining

whether or not a Writ of Certiorari should be granted. The critical questions are (1) whether the conflicting decisions in this case evidence a need for clarification from this Court and (2) whether the Court of Appeals "has decided an important question of federal law which has not been, but should be settled by this Court." Rule 17 of the Rules of the Supreme Court of the United States.

That clarification from this Court is required is evidenced by the decisions of the two lower courts here, both of which agreed that the same violations occurred, but which *at the same time* drew diametrically opposing conclusions as to whether those violations were substantial. These differing conclusions resulted from the application of different "substantiality standards". Thus, confusion can be reduced by this Court's establishing what the appropriate "substantiality standard" should be.

Second, and perhaps more important, the standard for enforcement of the Act is an important question of federal law which has not been but should be settled by this Court. How should compliance with the reforms of the Act be judged? It is peculiarly appropriate for this Court to address this issue because it involves the proper administration of the federal judicial system. Considering the importance of this issue to the administration of the federal judicial system, as well as the rights of litigants in the federal courts, a Writ of Certiorari should be granted.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE CLEARLY EXPRESSED INTENT OF CONGRESS THAT COMPLIANCE WITH THE STRICT REQUIREMENTS OF THE JURY SELECTION AND SERVICE ACT OF 1968 SHOULD BE JUDGED BY "PROCEDURAL REGULARITY" ALONE.

As noted above, resolution of the question of what is the correct "substantiality standard" for determining whether or not violations of the Act require relief depends primarily on determining the intent of Congress. Here the intent of Congress must be deciphered concerning legislation which intimately affects the operation of the federal judicial system. Accordingly, direction from this Court is particularly required.

The Act was the legislative response to growing criticism by the courts, commentators and the public of the then existing systems for the selection of jurors in federal courts. There was no uniformity. More important, it was becoming increasingly recognized that there was an inherent danger of discrimination in the non-random subjective jury selection systems typically in effect, even when implemented in good faith. H.R.Rep. No. 1076, 90th Cong., 2nd Sess. (1968), *reprinted* in 1968, U.S. Code Cong. and Admin. News, 1792, 1795 (hereafter "*House Report*"); S.Rep.No. 891, 90th Cong., 2nd Sess., p. 11 (hereafter "*Senate Report*"). See *Rabinowitz v. United States*, 366 F.2d 34 (1966).

After a lengthy investigation and extensive hearings, Congress concluded that the dangers inherent in the then present juror selection systems could be best avoided

by establishing a random and objective system for selecting jurors from the community at large which would be a "largely mechanical process in which the role of human discretion is minimized" and for which "procedural regularity is the measure of the validity of the selection system." *House Report*, 1805; *Senate Report*, 34. Randomness and objectivity were means to an end. *House Report*, 1794-1795.

Congress concluded that it could assume that the "ends" of non-discrimination and non-arbitrariness were being achieved as long as Scrupulous Compliance with the "means" of objectivity and randomness were being maintained.

Thus, the Congressional history states that the Act embodies "two important general principles":

> "(1) random selection of juror names from the voter list of the district or division in which the court is held; and
>
> (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. These principles provide the best method for obtaining jury lists that represent a fair cross-section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness."

Senate Report, 15; *House Report*, 1793.

The District Court concluded that the numerous acknowledged violations of the Act and the Plan here amounted to a substantial failure to comply with the Act because they directly affected these general principles.

Allowing for the inevitability of administrative errors and recognizing that "the rule of reason . . . regards inadvertent, imperfect efforts as insubstantial," 510 F.Supp. at 705, the District Court nevertheless found that the many violations complained of were "intentional" and so "persistent" that they had "infected" the system with "subjective extra-statutory standards" and allowed the important general principle of randomness "to be displaced by private whim". 510 F.Supp. at 705.

Though noting that there were occasions when the imposition of nonobjective standards were a manifestion of both a discriminatory intent and impact, as when the jury clerk excluded qualified jurors merely because they were over seventy due to the belief that jury service by the elderly "clogs up the works" and "inhibits justice" and when otherwise qualified jurors over seventy were disqualified "if their handwriting was 'shaky' or if they resided in a nursing or retirement home", because the jury clerks had decided such factors evidenced a "mental infirmity",[8] 510 F.Supp. at 701, fn. 49; the District Court nevertheless found that a discriminatory intent or impact, or potential for such, was not essential before a violation is substantial. The trial court concluded from the legislative history that abrogation of the general principles of randomness and objectivity is enough.

The Court of Appeals reached a different conclusion. It observed that "the purpose of the Act is to prevent discrimination, whether it be on account of 'race, color,

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[8] Even under the Court of Appeals discriminatory potential standard this violation was substantial.

religion, sex, national origin, or economic status' ". 659 F.2d at 609. Thus, the appellate court concluded, "Where the procedural errors made by those in charge of selecting juries do not raise the possibility of frustrating this goal, a court should be hesitant to order the drastic remedy of the dismissal of indictments."[9] 659 F.2d at 609.

This requirement that a defendant prove a discriminatory intent or impact, or potential for such, before being entitled to relief ignores the fact that Congress recognized that such a discriminatory impact or intent, or potential for such, is often impossible to prove. This was one of the primary concerns of Congress. Thus, it made clear that the purpose of the Act was to create a "mechanical process" for summoning jurors in which "procedural regularity" *alone* would be "the measure of the validity of the selection system." *House Report*, p. 1805, *Senate Report*, p. 34.

Indeed, the original Senate version of the Act required the moving party to prove prejudice resulting from the alleged procedural deviation before relief could be granted. *Senate Report*, p. 34. However, the House of Representatives rejected this requirement because of the belief "that the 'prejudice' requirement would unduly burden the procedure established by the bill for challenging noncompliance." *House Report*, p. 1806. Nevertheless, the

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[9] Accordingly, the Court of Appeals found the starting number/notice violations insubstantial because it was not proven that they "result or have the potential to result in discrimination among cognizable groups of prospective jurors." 659 F.2d at 602. Similarly, with regard to the erroneous excusals, exemptions, disqualifications, and exclusions, the Court of Appeals refused to find the violations substantial because, "[w]hile the clerk personnel in this case made a number of erroneous exclusions, there is no showing they were based on subjective criteria reflecting either a discriminatory intent or effect." 659 F.2d at 608.

standard asserted by the Court of Appeals requires proof of prejudice, or the potential for prejudice—a substantiality standard expressly rejected by Congress.

Senate Report No. 891 speaks directly to this issue. The Report explains that a proposal to engraft subjective juror screening onto the system proposed by the Act would require a procedure for challenging the bad faith of this screening. The Report then notes, "The availability of such a procedure would increase judicial burdens by requiring courts to evaluate allegations *not only of procedural irregularity* in the selection system, but also of bad faith. *It would thereby frustrate one of the purposes of the statute—to limit and simplify the challenge process by restricting challenges to those based on procedural grounds.*" Senate Report, p. 19 (Emphasis added).

Thus, the standard asserted by the Court of Appeals ignores the legislative history which indicates that Congress rejected a prejudice standard for determining whether violations of the Act are substantial and established "procedural regularity" *alone* as the measure of the validity of the system. Indeed, challenges were *restricted* to "procedural grounds" and Congress made clear that "no challenge lies" on the basis that "at any stage beyond the initial source list the selection process [does not] produce groups which accurately mirror community make-up", as long as "the procedures outlined in the bill are otherwise *rigorously followed.*" *House Report* 1794 (Emphasis added). The District Court found here that those procedures had not been rigorously followed but instead had been consistently and purposely ignored. It thus interpreted the legislative history to require relief. The Court of Appeals reversed and required an additional element of proof necessary for relief, namely a potential

for discrimination. This additional requirement is not only unsupported by the legislative history, but was, in fact, rejected by Congress.

Of course, here again, the critical question now before this Court is not whether the interpretation of the Congressional history by the District Court was correct, while the interpretation of the Court of Appeals was incorrect. All that need be decided is whether there is a substantial question as to whether the standard of the Court of Appeals is a correct interpretation of Congressional intent. Based on the legislative history cited above, Petitioners believe there is a substantial basis to conclude that the Court of Appeals was wrong.

As mentioned above, determination of Congressional intent with regard to a key provision of the Act is an important issue of federal law having a widespread effect on the administration of the federal courts. Moreover, deciphering Congressional intent in an important area of federal law affecting judicial administration is a particularly appropriate function of the United States Supreme Court. Accordingly, a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals reversing the decision of the District Court granting the Petitioners' timely jury challenge motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, Janet King, Assistant U.S. Attorney, 75 Spring Street, S.W., Atlanta, Georgia 30335, and John T. Orr, Jr., Anti-Trust Division, 1776 Peachtree Street, N.W., Atlanta, Georgia 30309, copies of the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by depositing same in the United States Mail with adquate postage affixed thereon to assure proper delivery.

This _____ day of _____, 1982.

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JOHN R. MARTIN